IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-2153

NATIONAL FOUNDATION FOR CANCER RESEARCH, INC., Petitioner,

v.

COUNCIL OF BETTER BUSINESS BUREAUS, INC., Respondent.

Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Brief for Respondent

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QUESTION PRESENTED

Whether the court of appeals correctly ruled that public figure status applies to a charitable foundation which mounts a public rostrum, through the use of massive solicitations and the media, to advance certain claims with the objective of eliciting a public response, and then brings a defamation action challenging commentary on those claims.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit has been reported at *National Foundation for Cancer Research, Inc. v. Council of Better Business Bureaus, Inc.*, 705 F.2d 98 (4th Cir. 1983). However, in the interest of convenience to the Court, citations will also be made to Petitioner's Appendix A.

STATEMENT OF THE CASE

The Philanthropic Advisory Service (hereinafter "PAS") is a division of the Council of Better Business Bureaus, Inc., (hereinafter "CBBB") which provides prospective donors and members of the public with information about the practices of charitable organizations. To this end, the PAS has developed voluntary standards for the purpose of evaluating such charities. Reports applying these standards are published with regard to those charities whose activities have generated numerous inquiries to the PAS.

The PAS first reported on the practices of the National Foundation for Cancer Research (hereinafter "NFCR") in 1975 after it received a large number of inquiries regarding NFCR's activities. The PAS continued to receive inquiries regarding NFCR and, thus, reported on this organization for the next 6 years.[1] The 1981 report contained the following conclusions which NCFR disputes:

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[1]Although NFCR belatedly seeks to impugn these facts, the uncontroverted evidence before the district court on the motion for summary judgment was that PAS published its reports in response to numerous inquiries from the public and the media regarding NFCR's practices. *See, National Foundation for Cancer Research, Inc. v. Council of Better Business Bureaus, Inc.*, 705 F. 2d at 101, (cited in Petition, at 7a).

> (1) The National Foundation for Cancer Research (NFCR) does not meet the provision of the BBB Standards for Charitable Solicitations which calls for spending a reasonable percentage of total income on program services, as distinct from fund raising and administration.
>
> (2) In its 1980 fund raising appeal, NFCR included statements which PAS regarded as inaccurate and misleading.

The latter comment was based on the claims made in NFCR's solicitations that "you can be sure we'll make the most productive use of every dollar you send. Not one red cent will go for the usual 'scientific foundation trappings.'" Such claims were made in NFCR's massive promotional campaign, which included the mailing of 67,859,900 pieces of direct mail solicitations over a 3 year period from 1979 through 1981. During this time period, NFCR received over $25,000,000 in public contributions.[2]

After evaluating NFCR's financial statements, PAS concluded that NFCR did not spend a reasonable percentage of its total income on program services (as distinct from fund-raising and management), based on its guideline that expenses for program services ordinarily should exceed 50% of total income in a given year. Further, the PAS found that the "not one red cent" claim was inaccurate.

Seeking to enjoin publication of the report, NFCR instituted a defamation action against CBBB in the United States District Court for the Eastern District of Virginia.

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[2]Claims regarding NFCR's role in finding a cure for cancer were also made in these solicitations. For example, NFCR conducted a sweepstakes in which it stated:

> The results have been astonishing. Properly funded and mutually stimulated, these rich fertile minds have leaped to the forefront of cancer research almost overnight.

On a motion for summary judgment, Judge Albert V. Bryan, Jr., ruled that NFCR had thrust itself to the forefront of a public controversy in order to influence the resolution of issues involved, and that, therefore, NFCR was a public figure for purposes of the defamation claim. NFCR then appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed the lower court's ruling.

The appellate court noted that NFCR had attempted to identify the controversy as merely a private dispute regarding the application of the PAS standards to NFCR, but the court rejected this characterization:

> Even though the "public controversy" which formed the basis of this lawsuit arose almost entirely from the Foundation's solicitation and use of funds for its cancer research, the mere fact that the NFCR generated the controversy does not preclude a finding that there was, in fact, a controversy.... The foundation vigorously sought the public's attention, and succeeded to a substantial degree, as is reflected by the approximately $25,000,000 it raised in the past three years and the numerous inquiries the CBBB had received from the public and the media regarding NFCR. It was these inquiries which in fact led the Council to undertake this evaluation.

National Foundation for Cancer Research, Inc. v. Council of Better Business Bureaus, Inc., 705 F. 2d 98, 101 (4th Cir. 1983), (cited in Petition, at 6a-7a). The court also found that NFCR had thrust itself into the public eye through its massive solicitation efforts, as well as the claims and comments made in these solicitations regarding NFCR's use of donated funds in finding a cure for cancer.[3] NFCR's

[3]The record demonstrated that NFCR also made successful use of the media, including the production of movies for public broadcasting.

statements, cited by the court, that it intended to make "NFCR a household word" and to "present its case to the jury of the American people" were reflective of these efforts. *Id.*

The court of appeals, therefore, correctly concluded that NFCR was a public figure for the purposes of commentary upon the claims made in its solicitation materials and its use of funds in cancer research. The court also held that the statement regarding the reasonableness of NFCR's expenditures was a protected expression of opinion and, therefore, not actionable under state defamation laws. NFCR has not sought a review of that ruling.

REASONS FOR DENYING THE WRIT

1. The court of appeals correctly ruled that in a defamation action, the *Gertz* limited public figure status applies to a charitable foundation which mounts a public rostrum, through the use of massive solicitations and the media, to advance certain claims with the objective of eliciting a public response, and then brings an action challenging commentary on those specific claims.

This is a paradigmatic case for the application of the limited public figure test enunciated in *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974). The Petitioner, in its own words, attempted to "present its case to the jury of the American people" in order to elicit a public response in the form of donations. This objective was accomplished, to the tune of twenty-five million dollars over a three year period, by the use of massive solicitations in which the Petitioner extolled its judicious use of funds in conducting cancer research. The Respondent, organized solely to promote informed decisions regarding charitable donations, commented specifically upon Petitioner's spending practices, and Petitioner's claims regarding those practices, through the application of the PAS voluntary standards and the publication of that evaluation.

In the wake of this publication and in the subsequent defamation action, Petitioner has attempted to characterize this case as one involving a private dispute over the application of the PAS standards, rather than a case involving comment on specific claims advocated by Petitioner in the public forum. As the court of appeals stated:

> The appellant would by its reliance on such cases as *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), portray itself as one victimized by the Council's attempt to "create" a defense by making the plaintiff a public figure, thereby erecting the *New York Times v. Sullivan*, [376 U.S. 254 (1964)] obstacles to recovery. However, it is clear from the record that the NFCR did not unwittingly become the subject of publicity with respect to its approach to cancer research or its use of donated funds. Quite to the contrary, it attempted, through various means at its disposal, to put itself and its methods before the public. With respect to these issues, it became a public figure under *Gertz*.

National Foundation for Cancer Research, Inc. v. Council of Better Business Bureaus, Inc., 705 F. 2d at 102, (cited in Petition, at 7a); *accord, National Foundation for Cancer Research, Inc. v. Newsweek Inc.*, No. J-81-353 (D. Md. May 20, 1982) (order granting summary judgment).

Petitioner seeks to obtain review by this Court by maintaining that the court of appeals disregarded the requirement that a public controversy be identified. It is obvious from a reading of the decision of the court of appeals, as well as the district court's opinion, that this very aspect of the case was taken into consideration and applied to the facts. In reality, the Petitioner takes umbrage with the manner in which this test was applied, complaining that the court of appeals never once used the

words "particular public controversy" in its opinion. Petition, 5. Such a strained application of the *Gertz* decision is clearly inappropriate.

Next, the Petitioner suggests that a preexisting controvery, independent of the parties involved in the defamation action, is a prerequisite to a finding that a defamation plaintiff is a limited purpose public figure. This proposition is untenable in light of the fact that it would insulate those persons who initiate and create public debate from public figure status. As the court of appeals stated, "the mere fact that the NFCR generated the controversy does not preclude a finding that there was, in fact, a controversy." *National Foundation for Cancer Research, Inc. v. Council of Better Business Bureaus, Inc.*, 705 F. 2d at 101, (cited in Petition, at 6a-7a).

Lastly, Petitioner apparently advocates a resurrection of the "newsworthiness" standard established in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) and overruled by *Gertz*. The Petitioner argues that the public figure standard may be applied only upon "a showing of societal need," Petition, 12, or in those instances where the defamation plaintiff is engaged in "meaningful public controversy." Petition, 16. This position is incorrect inasmuch as it would require:

> State and federal judges to decide on an *ad hoc* basis which publications address issues of "general or public interest" and which do not—to determine, in the words of Mr. Justice Marshall, "what information is relevant to self government."

Gertz v. Welch, 418 U.S. at 346, (quoting *Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 79).

In this case, the court of appeals took full cognizance of the public figure standard as articulated in *Gertz* and the subsequent decisions of this Court, and correctly applied this standard to the record.

2. The court of appeals' holding that Petitioner is a public figure is appropriately limited to the subject matter of the allegedly defamatory statements underlying this action.

The subjects of Respondent's allegedly defamatory comments were Petitioner's spending program and the accuracy of claims made in its solicitation materials regarding that program. The record below demonstrated that Respondent's commentary was published in response to numerous inquiries from the public and the media regarding Petitioner's activities, that the scale of Petitioner's promotional campaign was massive, and that the public response to this campaign was substantial.

This is not a case, therefore, presaging a fall over the slippery slope which will confer public figure status upon every charity, corporation, or other organization that conducts a promotional campaign or advertises, regardless of the scope of the advertising, the content of the specific claims made, or the success which that advertising has reaped. Rather, this is simply a case in which Petitioner vigorously and successfully sought public attention by making various claims in a massive promotional campaign, which ultimately generated commentary with respect to those claims. Petitioner mounted a public rostrum with the objective of eliciting a public response and now seeks to inhibit adverse commentary which its own advocacy has invited.

3. The court of appeals' decision is fully consistent with *Bruno & Stillman, Inc. v. Globe Newspaper Company*, 633 F. 2d 583 (1st Cir. 1980) and *Steaks Unlimited, Inc. v. Deaner*, 623 F. 2d 264 (3d Cir. 1980), as well as with the state court decisions cited by Petitioner.

In *Steaks Unlimited, Inc. v. Deaner*, 623 F. 2d 264 (3d Cir. 1980), the Court of Appeals for the Third Circuit held that through an advertising blitz promoting a beef sale, the plaintiff invited public attention and criticism with respect to the quality of its product and its sales practices,

and, therefore, was a public figure with respect to the defendant's commentary. After receiving "numerous telephone complaints from Pittsburgh area consumers," the defendant had broadcast a report criticizing the quality of the beef, as well as the sales tactics of the plaintiff. *Id.* at 274. The court concluded:

> Steaks voluntarily injected itself into a mtter of public interest—indeed, it appears to have created the controversy—for the purpose of influencing the consuming public.

Id.

In *Bruno & Stillman, Inc. v. Globe Newspaper Company*, 633 F. 2d 583 (1st Cir. 1980), the Court of Appeals for the First Circuit rejected the district court's blanket ruling that all corporations are to be treated as public figures for purposes of defamation actions. The court remanded the case for development of a record regarding the plaintiff's specific promotional activity. The allegedly defamatory comments in that case dealt with the quality of boats which were manufactured by plaintiff's company. According to the complaint, the company's sales increased steadily "by dint of 'enormous work and effort . . . in manufacturing, promoting and selling boats.'" *Id.* at 584. The court noted that apart from this bare allegation, it had no facts on which to base a determination as to whether the plaintiff was a public figure:

> Prior to the publication, we know only that the Company had steadily, over seven years, increased its production tenfold, from 8 to 90 a year. *We know absolutely nothing of its promotional efforts*, either in scale or nature. This record is to be contrasted with the concentrated "advertising blitz" which the Third Circuit held "invited public attention, comment and criticism" in *Steaks Unlimited*.

Id. at 591-592 (emphasis added).

Thus, it is clear from this language that no conflict exists between the First and the Third Circuits on this issue. Rather, in *Bruno & Stillman, Inc.*, the appellate court was simply without the sort of record which allowed the Third Circuit and, in the instant case, the Fourth Circuit, to reach their respective conclusions.[4]

The other federal cases relied on by the Petitioner are also in accord. *Hanish v. Westinghouse Broadcasting Co.*, 487 F.-Supp. 397 (E.D. Pa. 1980) did not involve a promotional campaign, but instead involved publicity which arose from an action for fraud against a charity. As a result of this publicity, a member of the charity who had allegedly perpetrated the fraud brought an action for defamation against the plaintiff in the fraud action. The court held that the mere fact that the defamation plaintiff had become the subject of press attention with respect to the action for fraud was not sufficient to render him a public figure. Thus, this case has no bearing on a defamation action arising from a massive promotional campaign by the plaintiff. Similarly, *General Products Co. v. Meredith Corp.*, 526 F. Supp. 546 (E.D. Va. 1981) was predicated on a finding that the plaintiff had made no effort to influence the consuming public by engaging in a promotional blitz.

Havalunch, Inc. v. Mazza, 294 S.E. 2d 70 (W.Va. 1981), decided by the West Virginia Supreme Court, is also consistent with these decisions. There, the court held that a small restaurant in a community with a large number of other restaurants and cafeterias, which neither solicited reviews nor held itself out to be a place of particular interest or culinary quality, did not attain the status of a public figure for purposes of comment upon its cuisine and ambience.

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[4]These decisions are also in accord with *Bose Corporation v. Consumers Union of the United States, Inc.*, 508 F. Supp. 1249 (D. Mass. 1981), *rev'd. on other grounds*, 692 F. 2d 189 (1st Cir. 1982) (holding that a promotional campaign rendered the manufacturer a public figure with regard to commentary on its product).

Lastly, Petitioner relies on *Vegod Corporation v. American Broadcasting Companies, Inc.*, 25 Cal. 3d 763, 603 P. 2d 14, 160 Cal. Rptr. 97 (1979), *cert. denied*, 449 U.S. 886 (1980), brought by a corporation which conducted close-out sales for stores. In this particular case, the store was a landmark which had been serving the community for a number of years, and its demise was widely reported by the news media. During the close-out sale, a broadcast reported that the store's management was not running the sale, but was being run by the plaintiff, and that the plaintiff had deceived the public by promising bargains which were not really bargains at all. The court rejected the defendant's arguments that merely doing business with parties to a public controversy elevates one to public figure status, and that the plaintiff had become a public figure by selling goods to the public and advertising the sale.

The Court stated that "a person in the business world advertising his wares does not necessarily become part of an existing public controversy" and that "while availability of goods for sale and their quality are matters of public interest, this is not the test." *Id.* at 101. The court did not consider whether the plaintiff, through the nature and scope of its advertising campaign, created a controversy with regard to the quality of the goods which were sold or the sales tactics employed. Thus, this case is clearly distinguishable from the one *sub judice*.

CONCLUSION

The lack of conflict among the courts attests to the flexibility and wisdom of the standard formulated by this Court in *Gertz* and further articulated in subsequent decisions. This standard has struck a proper balance between the competing values embodied in the First Amendment and the State's interest in the protection of individual reputation, by determining with precision

those instances in which the defamation plaintiff

> has relinquished no part of his interest in the protection of his own good name, and consequently [he] has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood.

Id. at 345.

What the Petitioner seeks in this case is a hypertechnical application of the language in *Gertz* which would allow it to avail itself of the public forum to advocate its cause, while at the same time inhibiting adverse comment on its claims by casting the spectre of a defamation action upon others who also wish to participate in that forum. This is precisely the situation in which public figure status, as set forth in *Gertz*, was intended to apply.

For the foregoing reasons, it is respectfully requested that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit be denied.

Respectfully submitted,

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